No. 49171-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GREGORIA LAYNA, Appellant.

Appeal from the Superior Court of Skamania County
The Honorable Brian Altman
No. 16-1-00010-8

BRIEF OF APPELLANT GREGORIA LAYNA

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III. STATEMENT OF THE CASE

1. Facts.

On February 24, 2016, Penny Oberst called the police to report a burglary. (RP 67, 97-98). Several items, including a motor home, had been taken from her barn. (RP 68-69). Ms. Oberst didn't know when the items had been taken, because she had not been out in barn in at least three to four weeks. (RP 99). No fingerprints were taken from the barn. (RP 86).

On February 21, 2016, Tina Anderson was horseback riding when she came upon a motor home stopped in the middle of the road. (RP 120). She yelled for someone to come out and move it and Mr. Layna, who she knows because he works at a gas station that she frequents, stuck his head out of the motor home. (RP 121). He told her the battery was dead. (RP 122).

On February 26, 2016, Liz Allen, who sold the motor home to Ms.

Oberst and knew it was missing, saw the motor home parked next to a house with a tarp over it and called the police. (RP 108-09, 127). The license plate was covered, but she testified that she knew it was the motor home that she sold to Ms. Oberst. (RP 109).

Deputy Rasmussen responded to where the motor home was parked. (RP 72). He spoke to the home owner, Michelle Williams[1]. (RP 78). Ms. Williams testified that the motor home arrived on the property on February 24th or 25th. (RP 149). She didn't see anyone drive the motor home onto her property, but she saw a man she did not know putting a log under the wheel. (RP 149-50). Mr. Layna was with him. (RP 150). She knew Mr. Layna from the gas station and because her kids knew him. (RP 150). She testified that she later called Mr. Layna about the motor home, to find out if it ran. (RP 151). When asked why, she testified, "-because I was under the impression that he wanted to sell it." She did not give any other testimony about why she was under that impression.

The officer had the motor home towed, obtained a search warrant, and searched it. (RP 82, 88). He did not find anything of evidentiary value inside. (RP 82). The inside of the motor home had been "cleaned out" and it was apparent that someone was hotwiring the motor home. (RP 83). The keys to start the motor home were also located inside. (RP

[1] She testified that it was not her property, but that she was a live-in caretaker for the property owner. (RP 152).

91-92).

Mr. Layna was arrested on February 26, 2016. (RP 88). No items from Ms. Oberst's barn were found on Mr. Layna or at the residence where he was staying. (RP 88).

At the close of its case, the State re-called Deputy Rasmussen and moved to admit the computer aided dispatch (CAD) logs from Ms. Oberst and Ms. Allen's calls. (RP 155-56, Exh. 19, 20). Defense counsel objected as to cumulative evidence and hearsay. (RP 155-56). The court admitted them both into evidence. (RP 156-57, Exh. 19, 20).

2. Half-Time Motion.

At the close of the State's case, Mr. Layna made a motion to dismiss the trafficking charge because the State had not presented sufficient evidence that Mr. Layna intended to sell the motor home. (RP 157). The court expressed some concerns, but denied the motion:

> That last witness' [Ms. William's] testimony was some of the strangest testimony I've heard. I – I just – she's under the impression he was going to sell it – why not a conversation? What – did – did a conversation occur with Mr. Layna? We don't know.
>
> . . .
>
> The guy with the beard – who is – there's a mysterious guy with a beard now. And – and why the RV was parked there in the first place – not – and that question wasn't asked. Why would somebody just go park the RV next to this house? We don't have a clue as to any of those things.

> There's a red SUV – two people – there's a guy with a beard – Mr. Layna doesn't have a beard – it wasn't Mr. Layna anyway probably – but we don't know any of those – any of those answers. Very strange testimony.
>
> . . .
>
> I still believe that it survives the half-time motion though . . . because all the evidence has to be looked at in the light most favorable to the State for this Motion.
>
> And looking at all the evidence it is possible that a jury could conclude that she was under the impression he wanted to sell it – some kind of dialog had occurred at some point. She said that George wanted to see what was running in the vehicle and what wasn't and that kind of thing. So that – that could get there.
>
> I'm denying the motion . . . .

(RP 159-60).

3. Closing Arguments.

The State, in its closing arguments, argued that Mr. Layna was the guilty of theft of a motor vehicle because he possessed a stolen motor vehicle:

> . . . Theft of Motor Vehicle. And your elements are in between January 25th and February 25th the range of . . . the Defendant wrongfully obtained or exerted unauthorized control over a motor vehicle.
>
> Okay. Just going from the 21st and the testimony of Tina Anderson Mr. Layna was in possession of this motor vehicle – it was not his. At least looking at the testimony you can easily infer that he was running this off that hotwire because the battery was dead.

> And ultimately consciousness of guilty – he had to get out of there when he was seen with that vehicle. And subsequently – again – he was in possession of this vehicle up on Glur Road and taping it to hide its identity.
>
> Item two - element two – the Defendant intended to deprive the other person of the motor vehicle. And everything we've seen here in the period of time – again the short period of time – the 21st through the 24th – when he had it up on Bergie – he had it out on Glur – Mr. Layna showed no intent to bring it back to the rightful owner.
>
> And he had – and it appears knowledge that this was not just property that was rightfully and in a righteous way there in his possession. Everything suggests that he knew it was stolen. And he was taking efforts to continue to keep this stolen item.
>
> Ultimately this act occurred in Washington.

(RP 184-85).

The State further argued:

> And the – and again the State puts forward the fact that he is in possession of this property which is the subject of a burglary – suggests that he is actually the person who stole it in the commission of that burglary.

(RP 186).

4. Verdict.

Mr. Layna was found not guilty of burglary in the second degree, guilty of theft of a motor vehicle, guilty of the lesser included offense of trafficking stolen property in the second degree, and guilty of possession of a stolen motor vehicle. (RP 209, CP 164-68).

5. Merger.

At sentencing, the State argued that none of the offenses merged because it was on-going, over several days, and the possession and trafficking were separate from the theft. (RP 211). Defense counsel argued that all constitute the same criminal conduct for purposes of Mr. Layna's offender score because they all required the same intent. (RP 213-14). The court found that they were three separate crimes that did not merge. (RP 214).

6. Legal Financial Obligations.

Mr. Layna asked the court to consider his ability to pay before imposing legal financial obligations, arguing that he was unemployed. (RP 216). The court's inquiring into Mr. Layna's ability to pay consisted of:

Judge: How will you be employed once you get out?

GL: I'm a mechanic.

Judge: Okay.

GL: I have – I have a number of shops I can work at.

Judge: Okay.

(RP 217). At the time, the court was aware that Mr. Layna had other pending charges as well. (RP 212-13).

Nonetheless, the court imposed the mandatory $100 DNA and

$500 crime victim penalty assessment (CVPA), as well as, $200 in court costs, $1,000 in attorney's fees, and $1,000 in emergency response fees. (RP 217, CP 222). The court also imposed $100 in restitution, an amount that may be changed at a later time. (RP 217, CP 222). However, the trial court found Mr. Layna indigent. (CP 209-10).

I. ARGUMENT

1. There Was Insufficient Evidence to Convict Mr. Layna of Theft of a Motor Vehicle.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Mr. Layna wrongfully obtained or exert unauthorized control over a motor vehicle, with intent to deprive the owner of the motor

vehicle. (CP 145); *see also* RCW 9A.56.065; 9A.56.020. The theft statutes, taken together, "set out four distinct types of theft: *theft by taking*, embezzlement, theft by deception, and appropriation of lost or misdelivered property." *State v. Southard*, 49 Wash. App. 59, 62, 741 P.2d 78, 79 (1987) (emphasis added), quoting *State v. Vargas*, 37 Wash. App. 780, 782, 683 P.2d 234 (1984). The jury was instructed that, "Wrongfully obtains means to take wrongfully the property or services of another." (CP 146); *see also* RCW 9A.56.010(22)(a).

Furthermore, a person cannot be convicted of theft and possession of stolen property related to the same incident. *See State v. Melick*, 131 Wash. App. 835, 839–40, 129 P.3d 816, 817–18 (2006); *State v. Richards*, 27 Wash. App. 703, 707, 621 P.2d 165, 167 (1980). "[W]hen proof is presented that the one possessing stolen property also stole it, such defendant may only be convicted of the initial theft or the unlawful possession, not both". *Richards*, 27 Wash. App. at 707. Therefore, to find Mr. Layna guilty of theft of a motor vehicle, the State was required to prove that Mr. Layna was the person who actually took the motor home from the barn, not just that he was in possession of it at a later date.

There was no evidence presented at trial that Mr. Layna took the motor home. No one saw him take it, there was no evidence from the barn that placed him there, and there were no admissions that he took the motor

home. It is unclear from the evidence at trial when the motor home was taken. According to the testimony, it could have been several weeks before Mr. Layna was seen with the motor home. There is no way for a jury to determine that Mr. Layna took the motor home rather than obtained it somehow after the fact. Therefore, there was insufficient evidence for a jury to convict Mr. Layna of theft of a motor vehicle and the conviction should be reversed.

2. There Was Insufficient Evidence to Convict Mr. Layna of Trafficking in Stolen Property in the Second Degree.

To convict Mr. Layna of trafficking in stolen property in the first degree, the State had to prove beyond a reasonable doubt that Mr. Layna recklessly trafficked in stolen property. (CP 154); *see also* RCW 9A.82.050. "Traffic means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." (CP 150); *see also* RCW 9A.82.010(19). Thus, the State was required to prove that Mr. Layna possessed the stolen motor home with the intent to sell it.

The only evidence presented at trial that Mr. Layna intended to sell the motor home was the testimony of Michelle Williams, who testified

that she contacted Mr. Layna about the motor home "- because I was under the impression that he wanted to sell it." (CP 151). She did not testify why she was under that impression, she did not testify that Mr. Layna told her that he wanted to sell it, and there was no other evidence whatsoever presented at trial that indicated that Mr. Layna intended to sell the motor home. The State argued that because other items were taken from the barn, in addition to the motor home, and they were not recovered, that Mr. Layna took the other items, sold them, and intended to sell the motor home. But, as argued above, there was absolutely no evidence that Mr. Layna took the motor home or any other items from the barn. Because there was no evidence that Mr. Layna intended to sell the motor home, the conviction for trafficking in stolen property in the first degree should be reversed.

3. Mr. Layna's Convictions for Theft of a Motor Vehicle and Possession of Stolen Motor Vehicle Violate Double Jeopardy; Therefore, One of the Convictions Must be Vacated.

Double jeopardy claims are reviewed de novo. *State v. Hughes*, 166 Wash.2d 675, 681, 212 P.3d 558 (2009). Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *State v. Turner*, 169 Wash.2d 448, 454, 238 P.3d

461 (2010); WASH. CONST. art I, § 9, U.S. CONST. amend. V.

When the legislative intent does not specify whether or not two separate convictions are allowed, then the *Blockburger* test is used to determine legislative intent. *State v. Freeman,* 153 Wash.2d 765, 771–72, 108 P.3d 753 (2005); *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The *Blockburger* test is also referred to as the "same evidence rule."

> Washington has adopted the "same evidence" rule of construction, which states that the defendant's double jeopardy rights are violated if he or she is convicted of offenses that are identical in both fact and law. If there is an element in each offense which is not included in the other offense, and if proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

State v. Melick, 131 Wash. App. 835, 839–40, 129 P.3d 816, 817–18 (2006), citing *State v. Calle,* 125 Wash.2d 769, 777, 888 P.2d 155 (1995); *State v. Vladovic*, 99 Wash. 2d 413, 423, 662 P.2d 853, 858 (1983).

In this case, Mr. Layna was convicted of theft of a motor vehicle and possession of a stolen motor vehicle. In this case, the State had the burden to prove beyond a reasonable doubt that Mr. Layna wrongfully obtained or exert unauthorized control over a motor vehicle, with intent to deprive the owner of the motor vehicle. (CP 145); *see also* RCW 9A.56.065; 9A.56.020. For possession of a stolen vehicle, the State had to

prove beyond a reasonable doubt that Mr. Layna knowingly possessed a stolen vehicle, with knowledge that it had been stolen, and withheld the vehicle from the owner or person entitled thereto. (CP 157); *see also* RCW 9A.56.068. Under the facts of the case, both charges required proof that Mr. Layna was in possession of a stolen vehicle. The only difference is that the theft charge also required proof that he took the vehicle. But, it is impossible for him to be guilty of theft of a motor vehicle without also having been in possession of that same stolen vehicle. The only evidence that tied Mr. Layna to either of these charges was the fact that he was seen in the stolen vehicle at a later date. Because, under the facts in this case, the same evidence was to convict Mr. Layna of both charges, the convictions for theft of a motor vehicle and possession of a stolen vehicle violate double jeopardy.

When two convictions violate double jeopardy, the remedy is to vacate the less serious offense. *State v. Melick*, 131 Wash. App. 835, 839–40, 129 P.3d 816, 817–18 (2006); *see also State v. Weber,* 127 Wash. App. 879, 888, 112 P.3d 1287 (2005), *petition for review granted,* 156 Wash.2d 1010, 132 P.3d 147, No. 77395–5 (Wash. Jan. 31, 2006) (remedy for convictions that violate double jeopardy is to vacate the crime carrying the lesser sentence). In this case, possession of a stolen motor vehicle is the less serious offense. If this court finds that there was sufficient evidence

to convict Mr. Layna of theft of a motor vehicle, the possession of a stolen motor vehicle conviction must be vacated and this matter remanded for resentencing.

4. The Convictions for Theft of a Motor Vehicle and Possession Merge; and Therefore, the Conviction for Possession of a Stolen Vehicle Must be Vacated.

If this court finds that the convictions for theft of a motor vehicle and possession of a stolen vehicle do not violate double jeopardy, this court should nevertheless vacate the conviction for possession of a stolen vehicle under the merger doctrine. Under this doctrine, "one cannot be both the principal thief and the receiver of stolen goods." *State v. Hancock,* 44 Wash. App. 297, 301, 721 P.2d 1006 (1986). *Melick,* 131 Wash. App. at 840-41; *see also Richards*, 27 Wash. App. at 707, citing *State v. Ladely*, 82 Wash.2d 172, 176, 509 P.2d 658 (1973); *State v. Hite*, 3 Wash. App. 9, 12, 472 P.2d 600 (1970), *cert. denied* 403 U.S. 933, 91 S.Ct. 2262, 29 L.Ed.2d 712 (1971). This is because the legislature intended to "reach a new group of wrongdoers, not to multiply the offense . . ." by criminalizing possession of stolen property. *Id.* at 841, citing *Milanovich v. United States,* 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961), quoting *Heflin v. United States,* 358 U.S. 415, 420, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959).

> If the State charges both theft . . . and possession arising out of the same act, the fact finder must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge. Only if the fact finder does not find sufficient evidence of the taking can it go on to consider the possession charge.

Melick, 131 Wash. App. at 840-41. If the trial court does not properly instruct the jury, the remedy is to dismiss the possession charge. *Id.; Hancock*, 44 Wash. App. 297, 299, 721 P.2d 1006 (1986).

Therefore, Mr. Layna cannot be convicted of both theft of a motor vehicle and possession of a stolen vehicle. If this court finds that there was sufficient evidence to convict Mr. Layna of theft of a motor vehicle, the possession of a stolen motor vehicle conviction must be vacated and this matter remanded for resentencing.

5. The Court Improperly Instructed the Jury on Theft of a Motor Vehicle, Which Confused the Jury and Improperly Allowed the Jury to Convict Mr. Layna of Theft of a Motor Vehicle Based on Possession Alone.

When a jury instruction was not objected to at trial, it can be reviewed if it involves a manifest error affecting a constitutional right. *State v. Schaler*, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

> An error is manifest if it had practical and identifiable consequences in the case. This standard is also referred to as "actual prejudice." . . .
>
> "[T]he focus of the actual prejudice [analysis] must be on whether the error is so obvious on the record that the error warrants appellate review. ... Thus, to determine whether

> an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error."

Id. (quoting *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009)) (internal citations omitted). A manifest error may occur if the trial court allows jury instructions clearly inconsistent with the law or that would allow a person to be convicted of lawful conduct. *See id.* at 287.

The court instructed the jury using standard Washington Pattern Instructions. The "to-convict" instruction was based on WPIC 70.26, and read:

> To convict the defendant of the crime of theft of a motor vehicle, as charged in Count Two, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or between January 25, 2016 and February 26, 2106, the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle;
>
> and
>
> (2) That the defendant intended to deprive the other person of the motor vehicle; and
>
> (3) That this act occurred in the State of Washington.

(CP 145). The WPIC was modified to eliminate some alternative means that were not applicable to this case. In the comments under WPIC 70.26, it cautions, "Care must be taken to limit the alternatives to those that were

included in the charging document and are supported by sufficient evidence."

The jury was also instructed on the definitions of unlawfully obtain and exerting unauthorized control based on WPIC 79.02:

> Wrongfully obtains means to take wrongfully the property or services of another.
>
> To exert unauthorized control means, having any property or services in one's possession, custody, or control, as a nature of custodian, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

(CP 146).

WPIC 79.02 makes it clear that wrongfully obtain and exert unauthorized control or two separate ways to commit theft, and instructs courts to use only those bracketed portions that are applicable. In addition, if the court instructs the jury regarding exerting unauthorized control, the term "nature of custodian" is in parentheses and the court is instructed to "[f]ill in the nature of the custodian of the property from the list set forth in RCW 9A.56.010: bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, officer of any person, estate, association or corporation, public officer, person authorized by agreement or competent authority to take or hold such possession, custody, or control." The comments further note

that "[t]he "exerts unauthorized control" alternative definition of theft includes what was embezzlement under prior law." *See State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); *State v. Dorman*, 30 Wash. App. 351, 354, 633 P.2d 1340, *review denied*, 96 Wash.2d 1019 (1981).

When the trial court instructs the jury on the embezzlement, or unauthorized control, prong, the trial court should also instruct the jury that the State is required to prove the relationship between the defendant and the victim:

> Since the trial court did use the embezzlement definition [or, exerting unauthorized control], it should have required the state to allege and prove the appropriate relationship or agreement between [the defendant] and [the victim] and instructed the jury accordingly. To do otherwise was to relieve the state of its burden to prove every element of the offense. Reversal is required unless the error was harmless.

State v. Linehan, 147 Wash.2d 638, 653, 56 P.3d 542, 549 (2002).

The trial court erred by including the definitions of exerting unauthorized control when there were no facts to support a theft by embezzlement. Furthermore, because the trial court did instruct the jury on the unauthorized control prong, it erred by not requiring the State to prove the relationship between Mr. Layna and the owner of the motor home that would have given him custody of the motor home, thereby relieving the State of its burden.

In this case, there was no evidence that Mr. Layna was a custodian of the motor home who exerted unauthorized control. The testimony was that he was never given permission to be in possession of the motor home. Therefore, the jury should not have been instructed regarding "exerting unauthorized control." Although technically an accurate statement of the law, because it did not apply to the facts in this case, it likely confused the jury and allowed them to find Mr. Layna guilty of theft of a motor vehicle based solely on evidence that he was later in possession of that vehicle, exerting unauthorized control. The fact that the jury returned inconsistent verdicts, acquitting Mr. Layna of burglary in the second degree and knowingly trafficking stolen property, but convicting him of theft of a motor vehicle, possession of a stolen motor vehicle, and recklessly trafficking in stolen property, is evidence that the jury likely misunderstood the jury instructions on theft due to the court including language about exerting unauthorized control. Therefore, the error was not harmless.

If this court does not find that there was insufficient evidence to convict Mr. Layna of theft of a motor vehicle, this court should reverse the conviction because the jury instructions improperly included the prong of exerting unauthorized control, which did not apply to the facts in this case and likely confused the jury and because the trial court failed to instruct

the jury that the State must prove the relationship (bailee, etc.) between Mr. Layna and the victim, relieving the State of its burden.

6. The Trial Court Erred by Admitting the CAD Logs.

The trial court improperly admitted the CAD (computer aided dispatch) logs. In this case, defense counsel objected as to hearsay and cumulative evidence. Defense counsel did not specifically object under the confrontation clause. However, manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3).

a. *The CAD Logs Were Inadmissible Hearsay.*

A trial court's interpretation of evidentiary rules is reviewed de novo. *Alvarez-Abrego,* 154 Wash. App. 351, 361-62, 225 P.3d 396, 401 (2010), citing *State v. Foxhoven*, 161 Wash.2d 168, 174, 163 P.3d 786 (2007). If the trial court's interpretation of the rules is correct, we determine if admission of the evidence was an abuse of discretion. *Foxhoven*, 161 Wash.2d at 174. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.*

"'Hearsay'" is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" ER 801(c). Hearsay is inadmissible unless there is an exception. ER 802. "In instances of multiple hearsay, each

level of hearsay must be independently admissible." State *v. Alvarez-Abrego*, 154 Wash. App. at 366; *citing* ER 805.

The CAD log itself was hearsay. No one from 911 or dispatch testified at trial, no foundation was laid for the admissibility of the CAD logs, and no hearsay exception was established. In addition, the statements of Ms. Oberst and Ms. Allen within the CAD logs were a second level of hearsay. They had both already testified at trial, so the evidence was cumulative. ER 403. And, no hearsay exception had been established for the admissibility of their statements. Therefore, the trial court erred in admitting the logs into evidence.

b. *Admitting the CAD Logs Violated Mr. Layna's Right to Confront Witnesses.*

Both the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to confront witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004); *see also* WASH. CONST. art. I § 22; U.S. CONST. amend. VI. "The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses." *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

While a trial court's decision to admit evidence is reviewed for abuse of discretion, appellate courts review a claimed violation of the confrontation clause de novo. *State v. Chambers*, 134 Wn. App. 853, 858,

142 P.3d 668 (2006), citing *State v. Larry*, 108 Wn. App. 894, 901, 34 P.3d 241 (2001). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The remedy for violation of a defendant's confrontation rights is vacation of the conviction and remand for a new trial. *State v. Perez*, 139 Wn. App. 522, 529-532, 161 P.3d 461 (2007).

> Not every out-of-court statement used at trial implicates the core concerns of the confrontation clause. Rather, the scope of the clause is limited to "'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Thus, the confrontation clause gives defendants the right to confront those who make testimonial statements against them.

State v. Jasper, 158 Wn. App.518, 526, 245 P.3d 228 (2010) (internal citations omitted).

Testimonial evidence is not admissible unless the witness is available to be confronted by cross-examination or has been previously cross-examined. "The State has the burden on appeal of establishing that statements are nontestimonial." *Alvarez-Abrego*, 154 Wash. App. at 351, citing *State v. Koslowski*, 166 Wash.2d 409, 417 n. 3, 209 P.3d 479 (2009).

"Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68.

In this case, the 911 dispatch operator created the CAD logs regarding a possible crime, which had already been committed, when Ms. Oberst and Ms. Allen called in regarding a stolen motor home. Therefore, the CAD logs are clearly testimonial. The dispatch operator who handled the calls and created the CAD logs did not testify and was not subject to cross-examination, in violation of the confrontation clause. Therefore, the trial court erred by admitting the CAD logs into evidence.

7. The State Committed Prosecutorial Misconduct by Misstating the Law in Closing Argument.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005). "However, if the alleged misconduct is

found to directly violate a constitutional right . . . then 'it is subject to the stricter standard of constitutional harmless error.'" *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wash. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wash.2d 757, 764, 675 P.2d 1213 (1984).

In this case, as argued above, the jury was improperly instructed regarding theft of a motor vehicle, but including definitions of "exerting unauthorized control," which were inconsistent with the facts in this case. The State in closing argument, improperly argued to the jury that the fact that the defendant was in possession of the motor home, was evidence that he was guilty of theft. It appears the State misunderstood the law, believing that it need only prove that Mr. Layna exerted control over the motor home without permission to prove theft, rather than proving that he actually took the motor home. The State's improper argument, although not objected to, was flagrant and ill-intentioned because it misstated the law and relieved the State of its burden. This improper argument was clearly prejudicial, given the jury's inconsistent verdicts, finding that Mr.

Layna was not guilty of burglary, but guilty of theft, and not reaching a verdict on knowingly trafficking stolen property, but finding him guilty of recklessly trafficking stolen property. Therefore, if this court finds that there was sufficient evidence to convict Mr. Layna of theft of a motor vehicle, this matter should be reversed and remanded for a new trial.

8. Mr. Layna Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherbv.* 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

As discussed above, the jury instructions improperly including "exert unauthorized control" in the theft instructions and did not require the State to prove a relationship between Mr. Layna and the victim that would be necessary under that prong of theft of a motor vehicle. The improper instructions relieved the State of its burden and allowed the jury to convict Mr. Layna of theft of a motor vehicle based on his mere possession of a stolen vehicle. Also, the State's closing argument regarding theft, arguing that Mr. Layna was guilty because he was in possession of the stolen motor vehicle, was improper.

Defense counsel did not object to the jury instructs or propose alternative instructions and did not object to the State's improper argument. Failure to object and/or offer alternative instructions on the theft charge was clearly unreasonable in this case.

Mr. Layna was prejudiced because the improper jury instructions and improper argument lessened the State's burden and clearly confused the jury, as evidenced by their inconsistent verdicts.

9. The Trial Court Improperly Imposed Legal Financial Obligations Without Taking Into Consideration Mr. Layna's Ability to Pay.

A trial court must inquire about a defendant's ability to pay before imposing legal financial obligations (LFOs).

> RCW 1 0.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015).

> Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39.

In this case, Mr. Layna requested that the court take into consideration his ability to pay with regard to imposing any non-mandatory LFO's, noting that he was unemployed. The court asked Mr. Layna how he would be employed upon release. Mr. Layna replied that he would work as a mechanic. The court made no further inquiry, and made no explicit finding that Mr. Layna had the ability to pay, before

imposing significant LFO's, including the mandatory $100 DNA fee and $500 CVPA, as well as, $1,000 in attorney's fees, $1,000 in emergency response fees, and $200 in court costs. The only concession the court made was that Mr. Layna would not have to begin making payments for two years.

At the time of sentencing, the court sentenced Mr. Layna to 18 months at the Department of Corrections and knew that Mr. Layna had other pending charges. Furthermore, the trial court signed an order of indigency.

The trial court made an inadequate inquiry into Mr. Layna's ability to pay. Given that Mr. Layna was found indigent and sentenced to the prison, the court abused its discretion by imposing over $2,000 in legal financial obligations when Mr. Layna was indigent.

10. This Court Should Not Impose Appellate Costs Because Mr. Layna is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[2], 14.1(c)[3].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In

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[2] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).

[3] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Layna was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 209-210). Mr. Layna is unemployed, has considerable debt, and almost no assets. (CP 206-08). In addition, he is currently serving a prison sentence. (CP 194-205). Therefore, it is extremely unlikely that Mr. Layna will be able to pay appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Layna does not substantially prevail.

I. CONCLUSION

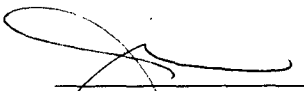
In conclusion, there was insufficient evidence to convict Mr. Layna of theft of a motor vehicle and trafficking in stolen property in the second degree. Therefore, those convictions should be vacated, and this matter remanded for resentencing. If this court finds that there was sufficient evidence to convict Mr. Layna of theft of a motor vehicle, then his conviction for possession of a stolen vehicle must be vacated

because it violates double jeopardy, or under the merger doctrine, and this matter remanded for resentencing.

In addition, the trial court improperly admitted CAD logs, the State committed misconduct by misstating the law, defense counsel was ineffective for failing to object to the jury instructions and the State's improper argument, and the trial court improperly imposed LFO's without considering Mr. Layna's ability to pay. For all these reasons, this matter should be reversed and remanded for a new trial and/or resentencing.

Dated this 21st day of September, 2016.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. GREGORIA LAYNA, Appellant.	)	NO. 49171-1-II CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Barton

Signed September 21, 2016 at Tacoma, Washington.

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